9-8-2011

State v. Wright Appellant's Brief Dckt. 38017

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38017
	)	
v.	)	
	)	
TIMOTHY EUGENE WRIGHT,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

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District Judge

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STATEMENT OF THE CASE

Nature of the Case

Timothy Eugene Wright appeals following his conviction for robbery. He asserts that the district court erred when it placed him in restraints and alerted the jury to the fact that he was restrained. He further asserts that the district court erred when it allowed the admission, over his objection, of irrelevant evidence of prior bad acts, and that the prosecuting attorney engaged in misconduct by eliciting and highlighting testimony that Mr. Wright refused to consent to a search. Alternatively, Mr. Wright asserts that the accumulation of serious errors throughout his trial deprived him of his right to a fair trial under the doctrine of cumulative error.

Statement of the Facts and Course of Proceedings

Mr. Wright and two others were charged with robbing employees of the Cash Store at gunpoint. (R., pp.22, 29-30.) Initially represented by counsel, Mr. Wright proceeded to a jury trial on the charge. (*See generally*, Tr.Vol.I[1].) After the first witness finished testifying, Mr. Wright moved, outside the presence of the jury, to discharge his attorney and represent himself. (Tr.Vol.I, p.49, Ls.18-24.) Following a *Faretta*[2] inquiry, the district court allowed Mr. Wright to act as his own attorney and discharged defense counsel. (Tr.Vol.I, p.49, L.25 – p.55, L.12.)

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[1] Three volumes of transcripts were prepared in this case. The first, which will be referred to as "Tr.Vol.I," was prepared on October 29, 2010, and consists of the trial proceedings and sentencing, with the exception of closing arguments, opening statements, and voir dire. The second, referred to as "Tr.Vol.II," was prepared on January 14, 2011, and consists of transcripts of the State's opening statement, a hearing on a motion to consolidate, and a pre-trial conference hearing. The third, referred to as "Tr.Vol.III," was prepared on May 20, 2011, and consists of transcripts of voir dire and closing arguments.

[2] *Faretta v. California*, 422 U.S. 806 (1975).

During the same hearing, the district court announced that it had ordered that Mr. Wright "be restrained and continue to be restrained until further order" based on behavior reported to it by the marshal. (Tr.Vol.I, p.49, Ls.14-18.) Prior to the jury returning to the courtroom, Mr. Wright requested that the district court remove the restraints, a request which was denied. (Tr.Vol.I, p.57, Ls.6-13.) The jury then returned to the courtroom, at which point the district court explained to them,

> For the record, so there's no question as far as what's going on, there's been a little fuss over the break and I've required that Mr. Wright be restrained. If he behaves himself here in awhile, we'll loosen that up.

(Tr.Vol.I, p.58, Ls.3-7.)

During his opening statement, the prosecuting attorney referred to anticipated testimony that Mr. Wright had refused to consent to a search of his person, specifically stating,

> While all this is going on, Timothy Wright is refusing to allow the police to look at the bottoms of his shoes.
>
> . . .
>
> Timothy, again giving the officers, the detectives a difficult time with their wanting to see his shoes, the bottoms of his shoes.

(Tr.Vol.II, p.23, L.19 – p.24, L.10.)

During the trial, the prosecuting attorney twice elicited testimony that Mr. Wright refused to consent to a search of his person, specifically the bottoms of his shoes, when asked by police to do so. The first such instance arose during the testimony of Lee Edgley, of the Idaho State Police, who was questioned as follows:

> [Prosecutor:] Okay. Now, at the scene did you receive cooperation from Mr. Hogg with regard to looking at his shoe bottoms?
>
> [Edgley:] Yes, we did.
>
> [Prosecutor:] And were you able to photograph those?

[Edgley:] Yes.

[Prosecutor:] And there was no problem in that regard; is that correct?

[Edgley:] No.

[Prosecutor:] I'm sorry. That's a double negative. My fault. Was there a problem in that regard?

[Edgley:] No, there was not a problem.

[Prosecutor:] How about with regard to Mr. Kenneth Wright?

[Edgley:] No, there was no problem with him.

[Prosecutor:] Okay. So you got to look at the bottom of the shoes that they were both wearing?

[Edgley:] Yes.

[Prosecutor:] Okay. Now, tell us about trying to take a look at the bottoms of the shoes that Timothy Wright was wearing.

[Edgley:] Mr. Wright did not want us to look at the shoes. I was informed by Sergeant Brush that he had contacted the Bonneville County Prosecutor, on-call Prosecutor, that he had received permission to photograph the shoes anyway and he asked me to go photograph them.

I went back and contacted Mr. Wright, Timothy Wright, and he voiced some concerns that I was violating his rights, picking on him because he is a black man and that I was fishing because we hadn't found anything at that point.

[Prosecutor:] Okay. Did you eventually obtain photos of his shoes and the bottoms?

[Edgley:] I did.

(Tr.Vol.I, p.99, L.8 – p.100, L.16.)

The second instance arose during the testimony of Sergeant Gary Brush, of the Idaho State Police, who was questioned as follows:

[Prosecutor:] Let's talk about Mr. Timothy Wright. Did you have any issues with him regarding looking at his shoes?

[Brush:] Yes. When we went over we did two things. We were asked to do things. We were asked to photograph each person, each of the three, and to photograph their shoes and they were sent up to Idaho Falls, I believe. When I went to photograph Timothy Wright's shoes, he refused to let me. He advised me that he was not going to give me permission to photograph his shoes.

(Tr.Vol.I, p.212, Ls.10-20.)

During closing argument, the prosecuting attorney again referred to Mr. Wright's refusal to consent to a search of his person, arguing,

> We had, again as further circumstantial evidence, Timothy Wright on more than one occasion at the scene as well as at the Pocatello Police Department being difficult with regard to the photographing of the bottom of the shoes that he was wearing in that robbery.
>
> Now, you'll recall from the testimony that Mr. Hogg and Mr. Kenneth Wright didn't have any problems with the shoes that they were wearing being photographed. The shoes that Kenneth Wright was wearing were in the trunk. They weren't on him at the time. Timothy apparently knew that there was a problem there. Now, again, the interview with Detective Moulton, he refused to have his shoes photographed and eventually they took the shoes away from him.

(Tr.Vol.III, p.105, L.17 – p.106, L.7.)

Mr. Wright was found guilty of the robbery, and received a life sentence, with a fixed term of fifteen years. (R., pp.98-99.) He filed a Notice of Appeal timely from the Judgment of Conviction. (R., p.102.)

ISSUES

1. Did the district court violate Mr. Wright's due process rights to a fair trial and the presumption of innocence when it placed him in restraints and informed the jury that he was so restrained?

2. Was Mr. Wright deprived of his constitutional rights to due process and a fair trial when the prosecutor elicited testimony that Mr. Wright invoked his Fourth Amendment right and referred to that fact in opening statements and closing arguments?

3. Did the district court err when it permitted the State to offer irrelevant prior bad acts evidence over Mr. Wright's objection?

4. Under the doctrine of cumulative error, was Mr. Wright's right to a fair trial denied as a result of the accumulation of serious errors throughout his trial?

ARGUMENT

I.

The District Court Violated Mr. Wright's Due Process Rights To A Fair Trial And The Presumption Of Innocence When It Placed Him In Restraints, And Informed The Jury That He Was Restrained

A. Introduction

Mr. Wright's due process rights to a fair trial and the presumption of innocence were violated when he was visibly restrained absent evidence that concerns for safety or decorum overrode his right to a fair trial in violation of the United States and Idaho Constitutions. In the alternative, even if the district court was justified in using restraints, it nonetheless erred when it failed to take action to ensure the use of the least restrictive and visible restraints available. For the reasons set forth below, Mr. Wright's convictions should be vacated, and a new trial should be ordered.

B. Standard Of Review

A trial court's decision to place a defendant in restraints during a jury trial is reviewed for an abuse of discretion. *State v. Miller*, 131 Idaho 288, 292-93 (Ct. App. 1997); *see also Deck v. Missouri*, 544 U.S. 622, 629 (2005).

C. The District Court Erred When It Placed Mr. Wright In Restraints, And Informed The Jury That He Was Restrained

During a break in the trial following the testimony of the State's first witness, the district court explained (outside the presence of the jury) that it had learned from "the Marshal that Mr. Wright has become combative and threatening to the Marshal and I have authorized . . . that he be restrained and continue to be restrained until further

order."[3] (Tr.Vol.I, p.49, Ls.14-18.) The district court was also told that Mr. Wright wished to fire his attorney and represent himself. (Tr.Vol.I, p.49, Ls.18-22.) After his attorney was discharged, and prior to the jury returning to the courtroom, Mr. Wright asked the district court to remove his restraints. (Tr.Vol.I, p.57, L.7.) The district court declined, explaining that if "[y]ou show me after awhile here you're doing okay ... I'll take them off[.]" (Tr.Vol.I, p.57, Ls.8-9.)

Upon bringing the jury back into the courtroom, the district court instructed the jury as follows:

> For the record, so there's no question as far as what's going on, there's been a little fuss over the break and I've required that Mr. Wright be restrained.[4] If he behaves himself here in awhile, we'll loosen that up.

(Tr.Vol.I, p.58, Ls.3-7.)

The due process clauses of both the United States and Idaho Constitutions prohibit visibly shackling or restraining a criminal defendant at trial unless "overriding concerns for safety or judicial decorum predominate." *State v. Crawford*, 99 Idaho 87, 96 (1978). This is because doing so infringes on the defendant's due process rights to a fair trial and to the presumption of innocence. *Id.* at 95, 98. When deciding to restrain a defendant, "'the information relied upon should be shown on the record ... and the defendant should be afforded a reasonable opportunity to meet that information.'" *Id.* (ellipsis in original) (quoting *State v. Moen*, 94 Idaho 477 (1971)). "[A]ny restraint must be based upon a finding of the necessity for that restraint." *Id.* at 98.

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[3] The record contains no description of the incident with the marshal; it is impossible to know whether Mr. Wright's behavior was purely verbal or involved physical resistance or violence.

[4] The record contains no description of the restraints, although an inference can be made that they were visible from the fact that the district court felt the need to explain their presence to the jury and from Mr. Wright's request, "May I have *these* off, sir?" made before the jury returned to the courtroom. (Tr.Vol.I, p.57, L.7 (emphasis added).)

The district court abused its discretion in this case when it placed Mr. Wright in visible restraints without an evidentiary hearing. In the alternative, assuming *arguendo*, that there was sufficient evidence to justify restraining Mr. Wright, the district court nonetheless erred when it informed the jury that Mr. Wright was restrained, the reasons for his restraint, and when it failed to use the least restrictive and visible restraints available.

1. The District Court Abused Its Discretion When It Failed To Hold A Hearing On The Necessity Of The Restraints

The Idaho Court of Appeals has held that "[t]he use of a restraint is reversible error if the trial judge fails to make a finding that the restraint is necessary." *Miller,* 131 Idaho at 293. This Court has held "that any restraint must be based upon a finding of the necessity for that restraint." *Crawford,* 99 Idaho at 98. Because it impacts a fundamental right, namely the due process right to both the presumption of innocence and a fair trial[5], a court's decision to restrain a defendant calls for "close judicial scrutiny," and "'[c]ourts must do the best they can to evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience.'" *Miller,* 131 Idaho at 293 (quoting *Estelle v. Williams*, 425 U.S. 501, 504 (1976)).

Here, no specific evidence was presented that Mr. Wright represented a threat to safety or judicial decorum. The only information regarding the reason for the district court's decision to restrain Mr. Wright is contained in the following portions of the transcript:

> THE COURT: During our recess I am informed by the Marshal that Mr. Wright has become combative and threatening to

[5] "The right to a fair trial is a fundamental right secured to us by the Fourteenth Amendment to the United States Constitution." *Miller* at 293 (citing *Drope v. Missouri*, 420 U.S. 162, 172 (1975)).

the Marshal and I have authorized, as a result of that, that he be restrained and continue to be restrained until further order.

...

THE DEFENDANT: May I have these off, sir?

THE COURT: No. You show me after awhile here you're doing okay and I'll take them off, but if we have incidents like we had downstairs, you're going to be locked down. I'm not going to have you threatening the Marshals. They're there to do their job and make sure that this courtroom is secure.

[Jury returns to the courtroom]

. . .

For the record, so there's no question as far as what's going on, there's been a little fuss over the break and I've required that Mr. Wright be restrained. If he behaves himself here in awhile, we'll loosen that up.

(Tr.Vol.I, p.49, Ls.14-18; p.57, L.7 – p.58, L.7.)

It is not always necessary that a district court specifically state the reasons for placing a defendant in restraints, so long as "the record sufficiently justifies the order to restrain [the defendant] *in a manner that would not be prejudicial.*" *State v. Knutson*, 121 Idaho 101, 106 (Ct. App. 1991) (emphasis added) (citing *State v. Moen*, 94 Idaho 477, 480 (1971)). In *Knutson*, the information in the record that supported placing the defendant in restraints consisted of the following:

> [T]he Twin Falls County Sheriff had requested, on the day before the jury was selected, that Knutson be shackled at trial because he posed a security risk. The prosecutor contended that Knutson was a security risk in view of the fact that he was charged with escape. The prosecutor pointed out that Knutson had previously escaped from a jail in the State of California. This prior escape was reflected in a presentence report ... Here, the prosecutor suggested that the potential for escape could be alleviated by having Knutson in leg irons with some sort of protective covering in front of both counsel tables, so that the jury would not be able

> to see the restraints. He further suggested that the jury could be excluded from the court when Knutson was brought into and out of the courtroom.
>
> . . .
>
> Aside from the harmless failure to specify his reasons for ordering the leg restraint, the judge followed the hearing procedures set forth in *Moen*.

Knutson, 121 Idaho at 105-07.

Mr. Wright asserts that the district court abused its discretion when it failed to set forth the evidence supporting its decision to restrain him, let alone hold an evidentiary hearing at which Mr. Wright could have contested the evidence upon which it based its decision. Furthermore, rather than restraining Mr. Wright "in a manner that would not be prejudicial[,]" the district court caused prejudice by alerting the jury to the restraints.

2. Mr. Wright Was Prejudiced Because The Jury Was Made Aware Of The Restraints

In order for a criminal defendant to prevail when the issue concerns the use of restraints during trial, "there must be some evidence that the jury saw the restraints and thereby drew a conclusion regarding the defendant's character." *Miller,* 131 Idaho at 293. In this case, it is beyond dispute that the jury was aware of the restraints because the district court specifically informed the jury that it had required Mr. Wright to be restrained because there had "been a little fuss over the break[,]" and that the court would "loosen that up" if he behaved himself for some length of time. (Tr., p.58, Ls.3-7.) Not only was the jury aware of Mr. Wright's restraints, they were informed of a reason specific to Mr. Wright's character that the restraints were being employed.

In addition to the jury being made aware of Mr. Wright's restraints, there is evidence in the record that the district court's decision impacted his ability to defend himself (as noted above, immediately after being restrained, Mr. Wright fired his

attorney). During its colloquy regarding his desire to fire his attorney, the district court admonished Mr. Wright as follows:

> If I am required to apply any restrictive orders because of your conduct, and this really is serious in light of what I've seen, do you understand that that really puts you at a disadvantage, that a lawyer in that circumstance can really protect you where you can't protect yourself because I may have to gag you? If you get mouthy, if you get disruptive, I'll put you in a chair and gag you. So a lawyer is really helpful if you're going to go that direction. If you want to mind your business and be a gentleman in court ... I'm okay.

(Tr.Vol.I, p.52, L.24 – p.53, L.11.)

It is entirely reasonable to believe that Mr. Wright did not advocate as forcefully for himself as he would have had the district court not threatened to gag him if he got "mouthy" or "disruptive." Mr. Wright's constitutional right to represent himself may have been chilled by such a threat.

3. Assuming, *Arguendo*, That Placing Mr. Wright In Restraints Was Appropriate, The District Court Erred When It Failed To Use The Least Restrictive And Visible Restraints Available, And When It Made The Jury Aware Of The Restraints

Even when a trial court has correctly ordered that a criminal defendant be restrained during trial, the general rule is that the restraints used "must be the least visible secure restraint, such as, it is often suggested, leg shackles made invisible to the jury by a curtain at the defense table." *Stephenson v. Wilson*, 619 F.3d 664, 668-69 (7th Cir. 2010) (citing *U.S. v. Brooks*, 125 F.3d 484, 502 (7th Cir. 1997); *U.S. v. Brazel*, 102 F.3d 1120, 1157-58 (11th Cir. 1997); and *Lemons v. Skidmore*, 985 F.2d 354, 358-59 (7th Cir. 1993)). The purpose behind such a rule is that visible restraints could cause jurors to infer that a defendant is "especially dangerous" which "might lead them to prejudge his guilt, *particularly in a trial for violent crimes* – and an inference of guilt

derived from a gratuitous visible restraint would infringe his constitutional right to a fair trial." *Id.* at 668 (emphasis added).

In the instant case, even if the trial court had used the least visible restraint possible, it severely hampered Mr. Wright's chance at a fair trial when it informed the jurors that Mr. Wright was restrained because he engaged in improper behavior outside the presence of the jury, and that the restraints would be "loosen[ed] if he "behave[d] himself" for some period of time. (Tr.Vol.I, p.58, Ls.3-7.) As such, even if the district court was justified in restraining Mr. Wright, it failed to use the least visible restraints possible in order to ensure that the jury was not made aware of them in violation of Mr. Wright's due process rights to a fair trial and the presumption of innocence. The district court's actions were particularly harmful in light of the fact that Mr. Wright was on trial for a crime of violence, armed robbery.

II.

Mr. Wright Was Deprived Of His Constitutional Rights To Due Process And A Fair Trial When The Prosecutor Elicited Testimony That He Invoked His Fourth Amendment Right, And Referred To That Fact In Opening Statement And Closing Argument

A. Introduction

The Fifth Amendment to the United States constitution, in relevant part, provides that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. Similarly, the Fourteenth Amendment, in relevant part, provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV. The Idaho Constitution similarly guarantees that "[n]o person shall be ... deprived of life, liberty or property without due process of law." ID. CONST. art. I, § 13. Due process requires criminal trials to be

fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may result in the denial of a fair trial. *Greer v. Miller,* 483 U.S. 756, 765 (1987).

At trial, the prosecutor elicited testimony that Mr. Wright exercised his Fourth Amendment right to be free from unreasonable search and seizure with respect to a search of his person and effects. During the prosecutor's opening statement and closing argument, the prosecutor emphasized this evidence. Because the prosecutor's misconduct was unobjected to, in order to prevail on a claim of fundamental error, Mr. Wright must satisfy the three-prong test set forth in *State v. Perry*, 150 Idaho 209 (2010). Under *Perry*'s three-prong test,

> [T]he defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists; and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

Id. at 226.

B. Mr. Wright Was Deprived Of His Constitutional Rights To Due Process And A Fair Trial When The Prosecutor Elicited Testimony That He Invoked His Fourth Amendment Right, And Referred To That Fact In Opening Statement And Closing Argument

1. The Prosecutor's Misconduct

During trial, the prosecuting attorney twice elicited testimony that Mr. Wright refused to consent to a search of his person or effects, specifically the bottoms of his shoes, when asked by police to do so. The first such instance arose during the testimony of Lee Edgley, of the Idaho State Police, which appears in the record as follows:

[Prosecutor:] Okay. Now, at the scene did you receive cooperation from Mr. Hogg with regard to looking at his shoe bottoms?

[Edgley:] Yes, we did.

[Prosecutor:] And were you able to photograph those?

[Edgley:] Yes.

[Prosecutor:] And there was no problem in that regard; is that correct?

[Edgley:] No.

[Prosecutor:] I'm sorry. That's a double negative. My fault. Was there a problem in that regard?

[Edgley:] No, there was not a problem.

[Prosecutor:] How about with regard to Mr. Kenneth Wright?

[Edgley:] No, there was no problem with him.

[Prosecutor:] Okay. So you got to look at the bottom of the shoes that they were both wearing?

[Edgley:] Yes.

[Prosecutor:] Okay. Now, tell us about trying to take a look at the bottoms of the shoes that Timothy Wright was wearing.

[Edgley:] Mr. Wright did not want us to look at the shoes. I was informed by Sergeant Brush that he had contacted the Bonneville County Prosecutor, on-call Prosecutor, that he had received permission to photograph the shoes anyway and he asked me to go photograph them.

I went back and contacted Mr. Wright, Timothy Wright, and he voiced some concerns that I was violating his rights, picking on him because he is a black man and that I was fishing because we hadn't found anything at that point.

[Prosecutor:] Okay. Did you eventually obtain photos of his shoes and the bottoms?

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(Tr.Vol.I, p.99, L.8 – p.100, L.16.)

The second instance arose during the testimony of Sergeant Gary Brush, of the Idaho State Police, who was questioned as follows:

> [Prosecutor:] Let's talk about Mr. Timothy Wright. Did you have any issues with him regarding looking at his shoes?
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> [Brush:] Yes. When we went over we did two things. We were asked to do things. We were asked to photograph each person, each of the three, and to photograph their shoes and they were sent up to Idaho Falls, I believe. When I went to photograph Timothy Wright's shoes, he refused to let me. He advised me that he was not going to give me permission to photograph his shoes.

(Tr.Vol.I, p.212, Ls.10-20.)

Clearly anticipating that this testimony would be offered, the prosecutor, during his opening statement, referred to Mr. Wright's refusal to consent to a search of his person, specifically stating,

> While all this is going on, Timothy Wright is refusing to allow the police to look at the bottoms of his shoes.
>
> . . .
>
> Timothy, again giving the officers, the detectives a difficult time with their wanting to see his shoes, the bottoms of his shoes.

(Tr.Vol.II, p.23, L.19 – p.24, L.10.)

During closing argument, the prosecuting attorney again referred to Mr. Wright's refusal to consent to a search of his person, arguing,

> We had, again as further circumstantial evidence, Timothy Wright on more than one occasion at the scene as well as at the Pocatello Police Department being difficult with regard to the photographing of the bottom of the shoes that he was wearing in that robbery.
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> Now, you'll recall from the testimony that Mr. Hogg and Mr. Kenneth Wright didn't have any problems with the shoes that they were wearing being photographed. The shoes that Kenneth Wright was wearing were in the trunk. They weren't on him at the time. Timothy apparently knew that there was a problem there. Now, again, the interview with Detective

Moulton, he refused to have his shoes photographed and eventually they took the shoes away from him.

(Tr.Vol.III, p.105, L.17 – p.106, L.7.)

2. Mr. Wright Had A Reasonable Expectation Of Privacy In The Soles Of His Shoes

In light of *dicta* contained in a 1982 Idaho Court of Appeals case, Mr. Wright anticipates that the State will argue that Mr. Wright did not have a reasonable expectation of privacy in the bottoms of his shoes. Aside from the fact that it is *dicta*,[6] Mr. Wright asserts that the conclusion reached in the *dicta* has been overruled by a subsequent United States Supreme Court opinion, and that the reasoning behind the conclusion is logically-flawed.

In *State v. Curry*, 103 Idaho 332 (Ct. App. 1982), the Idaho Court of Appeals considered, *inter alia*, whether the police acted lawfully when they seized a pair of shoes that the defendant was wearing at the time of his arrest. *Id.* at 338. Police were investigating a drug store burglary in which the burglars entered through a hole they made in one of the building's cinder-block walls. Just below the hole, police discovered a piece of cardboard with footprints on it. Both the cardboard and the ground near it "were covered with concrete fragments and white dust." *Id.* at 334-35.

In considering whether the seizure of Curry's shoes was lawful, the Court recited the facts, explaining that the initial stop of Curry was lawful, and that Curry had voluntarily complied with a request that he show the police the sole of one of his shoes. It was only after seeing the sole of his shoe, which had white dust on it and matched the shoeprint on the cardboard, that the police developed probable cause to arrest Curry, at

[6] Idaho appellate courts are, obviously, not bound by *dicta*. *City of Weippe v. Yarno*, 96 Idaho 319, 323 (1974) (citations omitted).

which time they seized the shoes as evidence of the crime. The Court noted, "At no time did Curry object or resist the officers' activities regarding his shoes." *Id.* at 338.

The Court then went on to its legal analysis, explaining,

> *We hold that the seizure of the shoes without a search warrant was proper.* Curry did not have a reasonable expectation of privacy with respect to the physical characteristics of the soles of his shoes. The imprint his shoes made upon the piece of cardboard was, like handwriting and speech, an activity "repeatedly shown to the public." Examination of the physical characteristics of the soles of his shoes by the officers "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search."
>
> Having observed and examined the soles of the shoes, and determined that Curry should be arrested, the officers then had the right to seize the shoes.
>
> ...
>
> *[T]he seizure of Curry's shoes was not unreasonable nor illegal.*

Id. (internal citations omitted) (emphases added).

An examination of the *Curry* opinion reveals that the question before the Court was whether Curry's shoes had been unlawfully seized. The Court's actual holding was that the seizure was lawful. The Court's expressed opinion regarding any reasonable expectation of privacy in the soles of Curry's shoes was *dicta*, especially in light of the uncontested fact that Curry had consented to an examination of the soles of his shoes prior to their being seized.

However, even assuming, *arguendo*, that the principle expressed by the Court of Appeals was not *dicta*, the logic upon which it was based has since been overruled by the United States Supreme Court. In *Arizona v. Hicks*, 480 U.S. 321 (1987), the Supreme Court rejected the notion that a *de minimis* search was exempt from the strictures of the Fourth Amendment. The Court reasoned,

> *It matters not that the search uncovered nothing of any great personal value to respondent* – serial numbers rather than (what might conceivably have been hidden behind or under the [stereo] equipment) letters or photographs. *A search is a search, even if it happens to disclose nothing but the bottom of a turntable*."

Id. at 325 (emphases added). The Court went on to hold that probable cause is required in order for the government to invoke the plain view doctrine to justify a search or seizure of an item. *Id.* at 326-28. To paraphrase the Supreme Court, in Mr. Wright's case a search is a search, even if it happens to disclose nothing but the soles of his shoes.

The Supreme Court's rejection of the idea that a *de minimis* search is of no constitutional significance directly contradicts the Court of Appeals' reasoning that "[e]xamination of the soles of his shoes by the officers 'involves none of the probing into an individual's private life and thoughts that marks an interrogation or search.'" As such, any non-*dicta* significance that the Court's reasoning in *Curry* had has been rejected by the *Hicks* opinion.

Finally, the Court of Appeals' reasoning in *Curry* is logically-flawed. The Court reasoned that because the burglar left visible shoeprints on cardboard at the scene of the crime, and those shoeprints were later matched to Curry's shoes, that Curry had no reasonable expectation of privacy in the soles of his shoes. However, until the police examined the bottoms of his shoes the police did not know that they matched the shoeprints left on the cardboard. The issue would, of course, be different if Curry was observed leaving behind shoeprints that matched those found at the crime scene, as Curry would have enjoyed no reasonable expectation of privacy in such shoeprints.

3. The Misconduct Constituted Fundamental Error

In *State v. Betancourt*, __ Idaho __ (Ct. App. August 3, 2011), the Court of Appeals considered whether unobjected to prosecutorial misconduct in commenting on a defendant's invocation of his Fourth Amendment right constituted fundamental error. The Court noted that the Idaho Supreme Court had held, pre-*Perry*, that it was misconduct and fundamental error for a prosecutor to elicit testimony from a witness regarding a defendant's refusal to consent to a search for the purpose of inferring guilt. *Id.* at __ (citing *State v. Christiansen*, 144 Idaho 463 (2007)).

While acknowledging that "the *Perry* fundamental error analysis was not applied to the facts in *Christiansen*" because it pre-dated *Perry*, the Court explained,

> [T]he reasoning in *Christiansen* that a prosecutor's use of a defendant's invocation of his or her Fourth Amendment right is analogous to the impermissible use of a defendant's invocation of his or her Fifth Amendment rights, applies to the first prong of the *Perry* analysis – whether the error complained of violates one or more of the defendant's unwaived constitutional rights.

Id. at __. The Court then concluded "that Betancourt has established the first prong of *Perry* because the prosecutor's comments during closing argument and rebuttal violated Betancourt's constitutional right to a fair trial." *Id.* As the facts of his case are almost identical to those in *Betancourt*, Mr. Wright has established the first prong of the *Perry* analysis.

With respect to the second prong, whether the error was plain, *Betancourt* is, again, instructive. In *Betancourt*, the State argued that "the prosecutor's comments are ambiguous, at best, and could not be considered to be plain error." *Id.* at __. In rejecting that argument, the Court noted,

> [T]he prosecutor's statement that Betancourt "did not want those troopers to search that vehicle" is clearly a comment on Betancourt's statements in the video refusing to consent to a search. Similarly, the prosecutor's

> statements during rebuttal also refer to Betancourt's concern about keeping the officers out of the vehicle. While the prosecutor focused on Betancourt's overall demeanor during the stop, it is plain from a review of the record that the prosecutor also requested that the jury pay particular attention to Betancourt's refusal to allow the search as evidence of his knowledge of methamphetamine in the car. Therefore, the second prong of *Perry* has also been established.

Id. at __.

As in *Betancourt*, the prosecutor in Mr. Wright's case highlighted his refusal to consent to a search, arguing,

> *We had, again as further circumstantial evidence, Timothy Wright on more than one occasion at the scene as well as at the Pocatello Police Department being difficult with regard to the photographing of the bottom of the shoes that he was wearing in that robbery.*
>
> Now, you'll recall from the testimony that Mr. Hogg and Mr. Kenneth Wright didn't have any problems with the shoes that they were wearing being photographed. The shoes that Kenneth Wright was wearing were in the trunk. They weren't on him at the time. *Timothy apparently knew that there was a problem there*. Now, again, the interview with Detective Moulton, he refused to have his shoes photographed and eventually they took the shoes away from him.

(Tr.Vol.III, p.105, L.17 – p.106, L.7 (emphases added).) The prosecutor clearly argued that Mr. Wright's refusal to consent to an examination of his shoes was substantive evidence of his guilt. Mr. Wright has satisfied the second prong of the *Perry* analysis.

Finally, with respect to the third prong, whether the error was harmless, Mr. Wright asserts that, in light of the circumstantial nature of the State's case against him, the complained of error cannot be said to have been harmless. *See State v. Seitter*, 127 Idaho 356, 359 (1995) (erroneously admitted evidence had "special significance" when the State's case was entirely circumstantial). In this case, the State acknowledged, in closing argument, "The State's evidence against Mr. Wright consists mainly of circumstantial evidence." (Tr.Vol.III, p.97, Ls.24-25.) Later, the State argued,

"The circumstantial evidence against Mr. Timothy Wright is overwhelming." (Tr.Vol.III, p.100, Ls.22-24.)[7]

III.

The District Court Erred When It Allowed The State To Offer Irrelevant Prior Bad Acts Evidence Over His Objection

A. Introduction

Mr. Wright asserts that the district court erred when it allowed admission, over his objection, of testimony and evidence that a person matching his description had behaved suspiciously at a bank the day before the robbery of the Cash Store (Tr.Vol.I, p.301, L.25 – p.325, L.23) because the testimony and evidence were not relevant.

B. The District Court Erred When It Allowed The State To Offer Irrelevant Prior Bad Acts Evidence Over His Objection

One of the witnesses presented by the State was Landon Perrenoud, a banking center manager for a Bank of America branch located in Idaho Falls. (Tr.Vol.I, p.302, Ls.2-14.) Mr. Perrenoud testified that, while working on December 21, 2009, he observed "a suspicious gentleman" wearing a sweatshirt similar to the sweatshirt that had previously been admitted as State's Exhibit No. 70, (Tr.Vol.I, p.304, L.25 – p.310, L.9), which Detective Moulton testified was worn during The Cash Store robbery by a person he believed to be Mr. Wright. (Tr.Vol.I, p.255, L.25 – p.263, L.4, p.276, L.25 – p.277, L.24.)

Mr. Perrenoud testified that he became concerned when he saw

[7] The only evidence that the State claimed was direct evidence against Mr. Wright was testimony from a witness "that when she heard his voice in the courtroom, having not heard it until then except for possibly at the robbery, Ms. Blakely Chavez said that that voice sounded similar to the voice of the second guy[.]" (Tr.Vol.III, p.102, Ls.18-23.)

> a suspicious gentleman walk in and kind of approach, like no customers would approach is up towards the gate of the teller window and just kind of looked around and as he was approached just walked out and nothing was said.

(Tr.Vol.I, p.305, Ls.10-14.)

When asked to elaborate on these suspicions, Mr. Perrenoud testified,

> Well, typically when you work in a bank you keep your eye out for different things going on in the banking center and suspicious behavior based on training and things that we take. Generally somebody walking in that, you know, has fully clothed, gloves, hoodies, different things where they're concealing their face where you're not able to see them and just the way they approach the teller line and where they do their business and things, it was just suspicious based on everyday customer behavior.
>
> ...
>
> [W]e take training and then yearly we take, you know, compliance training every year to identify these types of behaviors, whether they're suspicious or actual bank robberies or things like that that we are updated on annually.

(Tr.Vol.I, p.306, L.18 – p.307, L.10.)

Mr. Perrenoud then testified to observing a second incident that occurred several hours later, right before the bank closed, in which a suspicious looking African-American man entered the bank building before leaving and meeting up with a second person. (Tr.Vol.I, p.318, L.11 – p.320, L.12.) Photographs taken from video of both incidents were admitted, over Mr. Wright's objection, as State's Exhibit Nos. 59 and 60, respectively. (Tr.Vol.I, p.312, L.24 – p.315, L.17.)

Mr. Wright objected to Mr. Perrenoud's testimony, arguing

> I don't see the relevance in the robbery of the – in the robbery I'm accused of to a bank that was never robbed. A suspicious looking suspect he said he seen, he probably can't even identify.

(Tr.Vol.I, p.305, Ls.19-24.) The district court acknowledged that it didn't understand the relevance of the evidence, but allowed it to come in, subject to being "cut ... off" by the

district court some time later if it turned out not to be relevant. (Tr.Vol.I, p.305, L.25 – p.306, L.10.)

In closing argument, the State addressed the Bank of America evidence, arguing,

> Twice the person wearing that hoodie went to the Bank of America and, as you heard the testimony of Landon Perrenoud, that was a very suspicious situation. What were they doing there? They certainly weren't conducting any bank business, according to Mr. Landon Perrenoud.

(Tr.Vol.III, p.109, Ls.10-15.)

The Idaho Rules of Evidence prohibit the admission of evidence that is not relevant. I.R.E. 402. "Whether evidence is relevant is an issue of law" over which the Idaho appellate courts exercise free review. *State v. Atkinson*, 124 Idaho 816, 819 (Ct. App. 1993) (citations omitted). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401.

"The basis for the inadmissibility of a person's 'other acts' is that such evidence is not relevant to prove the conduct in question." *State v. Rodriguez*, 118 Idaho 948, 950 (Ct. App. 1990). The testimony of Mr. Perrenoud was nothing more than prior bad acts evidence tending to establish that a person, likely Mr. Wright, behaved suspiciously in a bank. The evidence consisted of nothing more than the opinion of Mr. Perrenoud, coupled with his speculation that such behavior can be an indicator of "actual bank robberies or things like that."

Mr. Wright asserts, especially in light of the district court's acknowledgement that it did not know the relevance of the objected to testimony (Tr.Vol.I, p.305, L.25 – p.306, L.10), that the evidence was not relevant to the question of whether Mr. Wright robbed the Cash Store, and should not have been admitted. Furthermore, unless the State can

establish that the objected to error was harmless beyond a reasonable doubt, then Mr. Wright is entitled to a new trial. *Perry*, 150 Idaho at 221-22.

IV.

Under The Doctrine Of Cumulative Error, The Accumulation Of Irregularities During Trial Was Sufficient To Warrant A New Trial

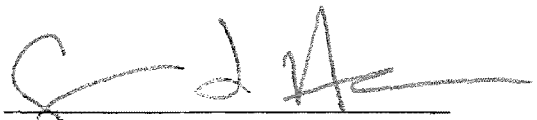
Mr. Wright asserts that, based on the fact that numerous substantial errors occurred in his trial, the doctrine of cumulative error applies to his case, and should result in his conviction being vacated. The argument and authority in support of his assertion of these errors is set forth in sections I, II, and III, and are hereby incorporated by reference.

In *State v. Harrison*, 136 Idaho 504 (Ct. App. 2001), the Court explained that, under the doctrine of cumulative error, the "accumulation of irregularities, each of which in itself might be harmless, may in the aggregate show the absence of a fair trial." *Id.* at 508. While Mr. Wright continues to assert that the errors that occurred throughout his trial were not individually harmless, he nonetheless asserts, in the alternative, that assuming, *arguendo*, that they were individually harmless, the accumulation of errors and irregularities deprived him of his right to a fair trial, and should result in his conviction being vacated.

CONCLUSION

For the reasons set forth herein, Mr. Wright respectfully requests that this Court vacate his conviction and remand this matter for a new trial.

DATED this 8th day of September, 2011.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of September, 2011, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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